THE INFERENCE FROM AUTHORITY TO INTERPRETIVE METHOD IN CONSTITUTIONAL AND STATUTORY DOMAINS

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42 *See infra* Richard Primus, *The Constitutional Constant*.

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Should courts interpret the Constitution as they interpret statutes? This question has been answered in a wide variety of ways. On the one hand, many scholars and jurists understand constitutional and statutory interpretation as largely overlapping, continuous, or converging. For some, this overlap follows directly from the Constitution's status as a form of legislated law.[43] In this way of thinking, because the Constitution, like a statute, was bargained over and formally adopted, it should be interpreted in accordance with general principles applicable to legislated law.[44] Proponents of this view argue that if constitutional interpretation appears distinctive in practice, that is because it involves the application "of usual principles" to "an unusual text," not because special principles apply.[45] For others, the commonality between constitutional and statutory interpretation follows from more general commitments about the character of law. The premise, for instance, that the fundamental imperative for courts is to make decisions—whether constitutional, statutory, or common law—that align with contemporary values renders constitutional, statutory, and common law methodology continuous.[46]

On the other hand, many embrace interpretive and methodological pluralism, including divergence between constitu-

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43 Legislated law, including statutory law and written constitutions, is expressly and intentionally made to change the law. *See* John Gardner, *Some Types of Law*, *in* COMMON LAW THEORY 51 (Douglas E. Edlin ed., 2007).

44 *See, e.g.*, JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 92, 80 (1882) ("Our constitutions, being, like statutes, written instruments and laws, are, in the main, similarly interpreted." (internal citations omitted)); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37–40 (1997) (explaining that a "common-law way of making law" is "not the way of construing a democratically adopted text," and noting that statutory rule that "a text does not change would apply a fortiori to a constitution"). John Manning also argues that the fact that the Constitution, like a statute, represents a settlement and compromise mitigates against the adoption of constitutional doctrines, such as federalism and separation of powers, which are not readily tied to particular provisions of the Constitution. *See* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2007–10, 2040 (2009); John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943, 1947 (2011).

45 SCALIA, *supra* note 44, at 37 (noting that constitutional interpretation "is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text").

46 *See, e.g.*, William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987) (contesting firm distinctions among statutory, common law, and constitutional interpretation; and positing that all should be interpreted dynamically); Ernest A. Young, *The Continuity of Statutory and Constitutional Interpretation: An Essay for Phil Frickey*, 98 CALIF. L. REV. 1371, 1384 (2010) (arguing that the Legal Process School's conception of statutory purpose, incorporating recourse to more fundamental purposes of public law "effectively renders statutory and constitutional [interpretation] continuous").

tional and statutory interpretation. Defenders of interpretive pluralism, of which I am one of many,[47] also come in different types. For some, pluralism follows from views about the authority of different types of law or their distinctive roles in the legal system.[48] For others, practical considerations of institutional competence, not first principles, justify divergence in interpretive method.[49] In this vein, many go a step further and argue that interpretive method also depends on the institutional position and capacities of the official doing the interpreting—that is, that the lower court, the Supreme Court, the President, and the administrative agency do not (or should not) have identical approaches to interpretation.[50]

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47 *See, e.g.*, Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 2–4 (2004) (arguing that neither originalism nor dynamic approaches to interpretation should be the same when applied to the Constitution and statutes); Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 356–65 (2012) (defending an interpretive method for regulatory interpretation based on the distinctive legal character and legal function of regulations); Kevin M. Stack, *Purposivism in the Executive Branch: How Agencies Interpret Statutes*, 109 NW. U. L. REV. 871, 873–81 (2015) (arguing that agency statutory interpretation is guided by different norms than judicial statutory interpretation). Many scholars defend a difference in constitutional and statutory (and common law) modes of interpretation; these issues are directly explicated and carefully considered in Kent Greenawalt's books on public law interpretation, as part of his three-volume exploration of legal interpretation. *See* KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION (2013) (comparing statutory and common law interpretation, including contrast between agency and judicial forms of statutory interpretation); KENT GREENAWALT, INTERPRETING THE CONSTITUTION 5 (2015) ("The similarity of statutes and constitutions [as forms of legislated law] does not entail that whatever represents sound statutory interpretation applies to interpreting a constitution. Any such equation would be deeply mistaken."); *see also* Kent Greenawalt, *Constitutional and Statutory Interpretation*, *in* THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 267, 271 (Jules Coleman & Scott Shapiro eds., 2002) (arguing for difference in constitutional and statutory interpretation); ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY 212–13 (2006) (arguing that agencies should draw on a wider array of interpretive tools than courts given their different capacities).

48 *See, e.g.*, SCOTT J. SHAPIRO, LEGALITY 357–59 (2011) (arguing that interpretive approach, for each set of officials, follows from their relative place in society's economy of trust); Jerry L. Mashaw, *Norms, Practices, and the Paradox of Deference: A Preliminary Inquiry into Agency Statutory Interpretation*, 57 ADMIN. L. REV. 501, 501–04 (2005) (observing and offering a defense of difference in agency and judicial statutory interpretation).

49 *See generally* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 885–90 (2003) (exploring how institutional capacities shape the way certain institutions interpret certain texts).

50 *See, e.g.*, Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 327–51 (2005) (arguing that strong horizontal stare decisis in statutory cases should not apply in lower courts); Aaron-Andrew P. Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433, 439 (2012) (arguing that different norms apply to lower courts and the Supreme Court when interpreting statutes); *see also* Stack, *Purposivism in the Executive Branch*, *supra* note 47, at 873–81 (citing literature on

Christopher Serkin and Nelson Tebbe's article, *Is the Constitution Special?*,[51] is a welcome addition to this long-running debate over the character of our constitutionalism. Their article has two basic elements. First, it carefully and compactly chronicles differences in the interpretive norms (which they call arguments) applied by courts when faced with statutory and constitutional questions. Serkin and Tebbe's thoughtful account of the dimensions of divergence in current law and practice is likely to inspire many forms of engagement.[52] Second, their article argues that these observed differences are not justified, and more generally, they contend that the case for divergence in constitutional and statutory interpretation has not been made.

In this essay, I focus on their second claim that divergence in interpretive approach between the Constitution and statutes is not—or has not yet been—justified. To defend this claim, Serkin and Tebbe's primary strategy is to isolate characteristics of the Constitution and constitutional law, and argue these characteristics do not, individually or collectively, justify the distinctive norms of constitutional interpretation that we observe. They consider a wide collection of attributes of the Constitution, including the generality of many of its terms, the fact that the Constitution includes broad aspirational principles (e.g. equal protection), the Constitution's relative entrenchment from express amendment, its legal supremacy, democratic legitimacy, and its merits and symbolic place in American self-understanding. Acknowledging that this is not a comprehensive set of characteristics or considerations that might differentiate the Constitution and statutes, their article ultimately relies upon a more general skepticism that understandings of the Constitution's authority "translate directly, or even particularly well into interpretive strategies."[53] The Constitution's "[a]uthority," they argue, "has less to do with argument than many suppose," and it "underdetermines

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arguing that agencies and courts interpret statutes under different norms and defending the view).

51 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

52 See, for a start, Richard Primus, *The Cost of Text*, *supra* (offering an explanation of the observed divergence).

53 Serkin & Tebbe, *supra* note 51, at 768 (endorsing general view skepticism about the connection between constitutional authority and interpretation in context of evaluating perfectionist arguments for the Constitution's authority); *see also id.* at 773–74 (embracing the same skepticism about argument for the Constitution's authority as central to American self-understanding and interpretive method).

interpretation."[54] In the end, Serkin and Tebbe allow that some argument from the Constitution's authority might justify a particular interpretive approach,[55] but they do not think the case has been made.[56]

Serkin and Tebbe's article, in company with prior scholarship,[57] raises a fundamental question about how much constraint conceptions of constitutional authority impose on constitutional interpretation. But to reach their further conclusion that the case for divergence in constitutional and statutory interpretation has not been made requires *a comparison* of the grounds of authority of the Constitution, on the one hand, and statutes, on the other. Even if arguments from authority do not dictate particular interpretive approaches, I argue that comparing the grounds of the authority of the Constitution and statutory law still suggests differences in the methods of constitutional and statutory interpretation.

One note of clarification at the outset: I treat Serkin and Tebbe's positions only in reference to constitutional and statutory interpretation by the Supreme Court; that excludes interpretive practices by other courts and other officials. This limitation is important. There are strong arguments that interpretive practice varies among the Supreme and lower courts, in state courts, as well as among executive officials. Limiting the evaluation to interpretation in the Supreme Court isolates the comparison between constitutional and statutory interpretation without confounding factors relating to the institutional stance of the interpreter.

I

To see how a comparison in the authority of the Constitution and statutes might support an argument for interpretive divergence, consider the following premises:

1. The Constitution (and constitutional law) and statutes (and statutory law) have distinct grounds of authority as well as distinct roles in our legal system.
2. The differences in the grounds of authority and legal roles of the Constitution (and constitutional law) and statutes

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54 *Id.* at 773.

55 *Id.* at 774.

56 *Id.* at 775.

57 *See* Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 640–69 (2008) (grappling with theories of constitutional authority and their connection to interpretive method).

> (and statutory law) make a difference to how the Court should interpret these two forms of law.

By authority, I mean an account of what explains the respect courts and others accord that form of law, and by role, I mean an account of the functions the form of law paradigmatically serves in the legal system. I address the reasons for the parenthetical inclusion of "constitutional law" and "statutory law" below.[58]

These premises generalize a principle articulated by Joseph Raz. Raz writes, "[a] principle of constitutional theory that commands widespread support says that the principles of constitutional interpretation depend in part on the theory of constitutional authority."[59] The generalization is that norms of interpretation, not only norms of constitutional interpretation, depend in part on the authority of the type of law at issue.[60] Tebbe and Serkin are skeptical about this generalized principle. One way to address that skepticism is to defend the two premises indented above. Those premises, if valid, justify divergence in interpretive approach to the Constitution and statutes—and might, one would hope, also shed light on the precise divergence that Serkin and Tebbe observe in current law.

To defend the first premise requires identifying grounds for the authority of the Constitution and statutes. Notice that not all characteristics or features of the Constitution also make claims to be a ground for the Constitution's authority. For instance, the generality of the Constitution's terms makes the Constitution unusual, though not unique, but generality does not itself provide a ground for why we owe the Constitution respect.[61] Likewise, the fact that the Constitution contains aspirational principles neither distinguishes it from statutes,[62] nor provides a ground for its authority. Among the characteristics of the Constitution isolated in Serkin and Tebbe's analysis,

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58 *See infra* Part IV.

59 Joseph Raz, *On the Authority and Interpretation of Constitutions: Some Preliminaries*, *in* CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS 152, 157 (Larry Alexander ed., 1998).

60 *See* Stack, *Divergence*, *supra* note 47, at 56 (defending this generalization of Raz's principle).

61 Though, as Primus argues, on different grounds, generality does make a difference to the constraints that text impose on interpretation. *See* Primus, *The Cost of Text*, *supra* note 52, at 6–7 & n.2; *see also* Serkin & Tebbe, *supra* note 51, at 751–53 (rejecting that the Constitution's often broad and general wording justifies its interpretive exceptionalism because the Constitution displays prolixity at times and certain statutes also display broad and general wording).

62 *See* Serkin & Tebbe, *supra* note 51, at 752.

the two most promising candidates that could be grounds for authority fall under the general mantles of (i) democratic legitimacy, and (ii) stability and continuity.[63] We view the democratic mandate or claim of democratic endorsement of a law as a reason to abide by it; and so too, law's role in creating continuity and stability in society also provides a reason to respect it.[64] Focusing on these two grounds for authority, the question is whether the Constitution and statutes part company in ways that make a difference to their interpretation.

II

First consider claims to democratic authority. As Paul Kahn observes, claims of democratic authority involve claims to represent a popular body.[65] If this is correct, then the democratic authority of the Constitution and statutory law are derivative of their underlying claims of representation.

But the body the Constitution claims to represent cannot be the same as the body represented by statutory law. Statutory law claims to represent and derive its authority from the legislative majority, and through it, the popular majority. The possibility of repeal or amendment of any statute gives existing as well as recently enacted statutory law a claim to represent the legislative majority. To be sure, many features of our system complicate and undermine the extent to which enacting coalitions reflect the popular majority or even the legislative majority. The current campaign financing regime, redistricting practices, veto-gates in the legislature (including super-majority thresholds for bill consideration), in addition to competition for scarce legislative time and resources, etc., make it more difficult to draw direct lines between enacting coalitions, legislative majorities, and the popular majority.

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63 Tebbe and Serkin note that the Constitution is superior to statutes in the sense of overriding statutes in the case of conflict. The fact that the Constitution is superior to other laws is part of what defines it as a constitution, *see* Raz, *supra* note 59, at 153, but that feature does not provide a ground for its authority. Serkin and Tebbe's interesting arguments about entrenchment I treat as part of my discussion of stability and continuity values. The perfectionist arguments do make claims as grounds for the Constitution's authority. I do not find them the most convincing grounds for constitutional authority, *see* Stack, *Divergence*, *supra* note 47, at 27–28, and so I pass over them here in favor of a focus on democratic legitimacy and stability and continuity.

64 *Cf.* DAVID A. STRAUSS, THE LIVING CONSTITUTION 37–39 (2010) (identifying command theories and common law approaches, rough cognates to my considerations of democracy and stability and continuity, as two traditions for understanding law).

65 PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 198 (1997).

Even allowing that statutory law is imperfectly majoritarian, it is clear that the Constitution's claim to represent a popular body cannot be a claim to represent the legislative majority. A basic element of our constitutional scheme is that the Constitution may check and invalidate the majority as expressed in legislation. The Constitution's democratic authority therefore presupposes that it represents a different democratic body, a different demos, than the legislative majority.

Who, then, does the Constitution claim to represent? Some constitutional theorists argue that the Constitution represents the past supermajorities who enacted and ratified its text, intending to entrench its provisions against change through normal lawmaking processes. As a ground for democratic authority, these views face familiar objections, of the type Serkin and Tebbe discuss, that they necessarily privilege the preferences of prior generations over current majorities (the dead hand problem).[66] In response, other constitutional theorists argue that the body the Constitution represents cannot be reduced to any moments of historical consent, but rather is an intergenerational body that defines "our 'fundamental nature as a people.'"[67] From this perspective, the Constitution claims to represent an abstract body, a body which exists now or existed in the past "under the rule of a particular political-legal order."[68] No doubt there is significant work to be done to explain how such a democratic subject makes a claim of authority over us. Perhaps the hope of a democratic basis for the Constitution's authority is ultimately wistful. But the basic point remains that whether one simply views past supermajorities or an inter-temporal subject as the body represented by the Constitution, statutory law and the Constitution have different sources of democratic authority because they claim to represent different democratic bodies.

Turning to the second premise, what implications do these different claims of democratic authority have for statutory and constitutional interpretation? Adam Samaha, who is a skeptic about the relationship between *constitutional* authority and in-

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66 *See* Serkin & Tebbe, *supra* note 51, at 766; *see also* Samaha, *supra* note 57, at 616–25 (discussing dead hand arguments).

67 Robert Post, *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13, 24 (1990) (quoting Hanna Fenichel Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 169 (1987)); *see* JED RUBENFELD, FREEDOM AND TIME 61, 153–54 (2001); *see also* Stack, *Divergence*, *supra* note 47, at 35–42 (discussing views of the democratic subject of the Constitution).

68 RUBENFELD, *supra* note 67, at 153.

terpretation, is not worried about the authority-interpretation inference in the context of statutory interpretation. Conceptions of the authority of legislation, he writes, "might logically guide statutory interpretation."[69] I agree; statutory authority provides some direction to statutory interpretation. Consider a statute's democratic character: the statute represents the legislative majority and ultimately the popular majority through discrete moments of *authorization.* In an election, the authorization flows from the popular majority to the elected officials, and then in the moment of statutory enactment, from the elected officials to the law. The statute's representative and democratic character is defined by these moments of authorization. This makes a difference to statutory interpretation: it justifies interpreting statutes in a way that attends carefully to the statutory text enacted and to the statute's stated and public aims. Moreover, the courts' (and especially the Supreme Court's) statutory interpretations remain accountable to the current legislative majority; if Congress disagrees with the Court's interpretation, it can make corrections.[70]

In contrast, the body the Constitution represents is not identified with an ongoing federal institution, like the legislature, and judicial interpretations face little practical prospect of override. The Constitution's representation of a popular body thus has a more symbolic character; the Constitution represents its demos whether conceived as past supermajorities or an intergenerational people less through discrete moments of authorization, which an existing body can monitor and call back, than by *standing for* the people it represents.[71] We (the People) are constituted and symbolized by the Constitution; as Serkin and Tebbe observe, the Constitution has a uniqueness as a cultural symbol, in part because our political-legal order is identified with the existence of our Constitution.[72]

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69 Samaha, *supra* note 57, at 637.

70 *See* William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 331–43 (1991) (documenting the congressional practice of overriding Supreme Court statutory interpretation decisions); *cf.* Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 860–66 (2012) (documenting how the Supreme Court will reinvigorate precedent that Congress has overridden).

71 *See* HANNAH FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 39–43, 101–03 (1967) (discussing representation as authorization and as symbolic 'standing for'); KAHN, REIGN OF LAW, *supra* note 65, at 199, 218.

72 *See* Primus, *The Cost of Text*, *supra* note 52, at 11 (noting that American lawyers frame issues of significance in constitutional terms).

Serkin and Tebbe view "[r]emarkably little" as following from the Constitution's distinctive status as a symbol.[73] But comparing the symbolic character of the Constitution's representation of its subject with that of statutory law sets constitutional and statutory interpretation on different paths. In the constitutional domain, to claim democratic authority, interpretation must itself play a role in identifying and sustaining a connection with the body that the Constitution claims to represent. It is from this perspective that Robert Post observes, the authority of the Constitution "does not flow from the antecedent nature of the Constitution, but rather from the particular relationship we have forged with the Constitution" through interpretation.[74] The symbolic character of the democratic subject the Constitution claims to represent places a burden on constitutional interpretation of setting forth principles that the people can view as their own.[75] This is not to say that background values play no role in statutory interpretation; they do.[76] In the statutory case, courts may check the prospective interpretation against background principles. But statutory interpretation does not have the same narrative burden of articulating principles in a way that makes sense of, and ultimately constitutes, our collective commitments as a people.

From this perspective, important elements of the divergence Serkin and Tebbe observe in how courts treat these forms of law fall into place. In particular, the greater attention to text in statutory interpretation makes sense given the directness of the claim of democratic authorization of statutory text. Further, the elaboration of the Constitution's requirements through a body of law that remains at a considerable distance from the Constitution's text provides a means of articulating and updating principles that the people can identify as their own. In short, representation through authorization privileges text, whereas symbolic representation privileges persuasion through judicial narrative. Comparison of the grounds of dem-

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73 Serkin & Tebbe, *supra* note 51, at 773.

74 Post, *supra* note 67, at 29; *see also* Paul W. Kahn & Kiel Brennan-Marquez, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115, 144 (2014) (explaining that "[t]he courts must persuade the people to take the position of authorship [of the Constitution]; they must present the meaning of the text such that the people can hold themselves accountable for this text").

75 *See* Kahn & Brennan-Marquez, *supra* note 74; at 144.

76 *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 9 (tent. ed. 1958) (advocating for background values as a check to statutory interpretation); Kahn & Brennan-Martinez, supra note 74, at 140–44 (illustrating the same in contemporary context).

ocratic authority thus suggests different orientations in constitutional and statutory interpretation.[77] Even if we ultimately conclude that the Constitution's claim to democratic authority is fictive, that conclusion still has implications for interpretation. It means that arguments for attending to text have a democratic grounding in statutory interpretation that they lack in constitutional interpretation.

III

Let us now consider another ground of authority: the role of law in creating continuity and stability in the legal order. To be sure, continuity and stability are not the only virtues of law. We also prize law that fosters innovation or justice, for instance. But stability and continuity remain fundamental virtues of legal arrangements. Perhaps most important for our purposes, creating stability and continuity in a legal order is also a ground for law's authority. That is, other things equal, a reason to comply with a form of law is that it creates stability and continuity.

Statutory law and the Constitution, however, have a different relationship to stability and continuity. Part of the task of a constitution and constitutionalism is to create a "stable framework for the political and legal institutions of the country,"[78] and to "preserve stability and continuity in the legal and political structure."[79] While constitutions are subject to adjustment from time to time, to have a constitution is to recognize a form of higher law that is not subject to the same vicissitudes as ordinary lawmaking forms; constitutions may change, but a constitution is designed to be relatively enduring. This is not to deny, as Serkin and Tebbe importantly reveal, that many other forms of law turn out to be just as enduring;[80] nor is it to deny that there are other forms of lawmaking that intend to constrain future majorities.[81] But it still is the case that constitutional law paradigmatically has the legal and political aim of

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77 The Constitution might be thought to have a different kind of connection to democracy, in particular by promoting the democratic process. In *Divergence*, I consider process-based conceptions of the Constitution's authority and argue that this role too pushes constitutional and statutory interpretation norms in different directions. *See* Stack, *Divergence*, *supra* note 47, at 29–33.

78 Raz, *supra* note 59, at 153.

79 *Id.*

80 Serkin & Tebbe, *supra* note 51, at 753–59 (considering whether the Constitution's interpretive exceptionalism can be rooted in its entrenching quality).

81 *See generally* Daryl Levinson & Benjamin I. Sacks, *Political Entrenchment and Public Law*, 125 YALE L.J. 400, 402–08 (2015) (examining how politicians employ functional entrenchment mechanisms in addition to the formal modes of

constraining future majorities and thus creating stability and continuity to a greater extent than statutory law.

This different connection of constitutional law and statutory law to the values of stability and continuity also has implications for their elaboration. While the Constitution's role in creating continuity does not specify a single interpretive method for the Constitution,[82] it makes a virtue of interpretive approaches that constrain the pace of change from current norms.[83] Interpreting the Constitution to serve stability and continuity recommends modes of elaboration of the Constitution's requirements that give substantial weight to the status quo and require special justification for departures from it, and even then, favor incremental and developmental changes. Fostering stability and continuity thus provides a strong endorsement of our common law style constitutional elaboration: our common law constitutionalism gives a legal presumption in favor of status quo norms and requires special justification for an interpretation that results in a changed reading of what the Constitution requires. From this perspective, it makes sense that we identify our "constitutional law" with the judiciary's precedential elaborations of the Constitution's requirements; doing so is a way of promoting stability and continuity in our constitutionalism.

Statutory law, in contrast, does not labor under the same preservationist norms. When deciding whether to enact a new statute, Congress faces no formal legal presumption in favor of the existing law; so long as Congress acts constitutionally, it need not provide special justification to change the law, much less opt for more incremental as opposed to cross-cutting solutions. So too, no requirement of special justification applies to courts when they enforce new statutory requirements; their job is to implement the statute, even if it involves making significant changes in the law. In this way, the criteria for valid change in statutory law and constitutional law differ. With regard to statutory law, Congress may enact a new statute or statutory amendment that dramatically changes the existing law, and courts routinely enforce those changes without requiring special justification. With regard to constitutional law, outside of the rarity of constitutional amendment, the court's criteria for recognizing and enforcing changed readings of the

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entrenchment through rules governing elections and the processes for enacting and repealing legislation).

82 Samaha, *supra* note 57, at 666.

83 *Id.*

Constitution creates a presumption in favor of the status quo, and requires special justification for change. In sum, constitutional and statutory law labor under different criteria for valid change: a preservationist norm that requires special justification for change applies to constitutional law but not to statutory law. In this way, stability and continuity ground different norms of change for constitutional and statutory law.

It might be objected that this analysis relies on a false comparison; it compares change in "constitutional law" as articulated by the courts to change in "statutory law," including when Congress enacts a new statute or amends an old one. I think this comparison is defensible. First, consider Serkin and Tebbe's usage. They do not distinguish between constitutional interpretation, constitutional implementation, the Constitution, and constitutional law. For instance, Serkin and Tebbe argue that "the meaning of constitutional provisions is constantly changing" outside of Article V formal constitutional amendments.[84] In other words, they treat changes in the judicial doctrines of constitutional law as changes in the Constitution. Thus the norms or arguments they refer to as "constitutional argument" pertain to the specification or implementation of constitutional law, including, norms of precedent which clearly do not pertain to "interpretation" in a narrower sense. This inclusive, non-formalist stance towards the set of norms that come within the dialogue of constitutional interpretation is widely shared,[85] and reflects the view that constitutional law changes primarily through judicial decisions.

I have no objection to this broad view of what comes within the domain of "constitutional interpretation and argument," but that same non-formalist stance should also apply when considering what counts as statutory interpretation and argument. If constitutional interpretation and argument includes norms that apply to constitutional development and lawmaking, then so too statutory interpretation and argument should include norms that apply to statutory development and lawmaking. Taking this functional stance with regard to *both* constitutional and statutory law reveals that a preservationist constraint has greater hold on our constitutional than statutory law for the simple reason that change in constitutional law

84 Serkin & Tebbe, *supra* note 51, at 757.

85 *See, e.g.*, ADRIAN VERMEULE, THE CONSTITUTION OF RISK 5 (2013) (noting that constitutional interpretation often amounts to constitutional rulemaking and declining to make a strict distinction between interpretation and implementation).

is constrained by precedent whereas change in statutory law is not.

Serkin and Tebbe might still object that they observe courts applying a less stringent form of precedent with regard to constitutional decisions than statutory ones, so doesn't that suggest a greater preservationist norm with regard to statutory law? This difference in the strength of precedent does not reveal that constitutional law is less preservationist than statutory law. In all but the rarest occasions, the only way constitutional law changes is through reversals of judicial precedent. Not so for statutory law. Congress regularly amends statutes in ways that change prior statutory text and also overrules prior judicial constructions. So the black letter doctrine that statutory precedent is stronger than constitutional precedent does not negate the underlying point that a greater preservationist norm applies to constitutional law and elaboration.

To summarize, the difference in the roles of constitutional and statutory law in creating stability and continuity justifies divergence in their modes of elaboration. Constitutional law's role justifies granting weight to current norms and requiring special justification for change; that same preservationist norm does not apply to statutory development. Put another way, a legal presumption in favor of the status quo is intrinsic to constitutional elaboration, but not to statutory law. Accordingly, the challenge of accommodating change while preserving continuity and stability makes a distinctive demand on constitutional elaboration.

IV

Serkin and Tebbe ask *Is the Constitution Special?* My response is that to understand the Constitution's distinctiveness requires comparing the grounds for the authority of statutory and constitutional law. Constitutional and statutory law have different claims to democratic authority and different connections to the values of stability and continuity. Even if these particular grounds of authority do not constrain interpretive choice for statutes or the Constitution to a single method, the contrast suggests different orientations and guideposts in constitutional and statutory interpretation. The contrast also suggests justification for some of the divergence which Serkin and Tebbe observe in current practice, including the greater role of statutory text, the greater reliance on judicial decisions as the

means of elaboration of the Constitution, and the different role for precedent.

Suggesting that the interpretation of these two forms of law depends in part on their different sources of authority does not deny that at times it will be very difficult to distinguish constitutional and statutory interpretation. Statutory interpretation may be hard to distinguish from constitutional interpretation when, for instance, a court is construing a very old statute, written in general or aspirational terms, with a significant body of stable precedent elaborating it.[86] More generally, to suggest that some aspects of the authority of constitutional and statutory law diverge is not to deny that these two forms of legislated law may have some overlapping grounds of authority which might, in a given case, be more important than their differences. The basic point remains that the distinct authority and roles of constitutional and statutory law provides a foundation for divergence in their interpretation.

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86 *See* Primus, *The Cost of Text*, *supra* note 52, at 2 (arguing that when a domain is rich with case law the decision making typically will proceed on the basis of that case law, whether the matter concerns a statute or the Constitution).

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87 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

88 *See id.* at 708–49.

89 *See id.* at 749–75.